IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1660

U.S. LABOR PARTY,
Petitioner,

v.

GRENVILLE B. WHITMAN
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
COURT OF APPEALS OF MARYLAND

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U.S. LABOR PARTY,
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Respondent.

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PETITION FOR A WRIT OF CERTIORARI
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COURT OF APPEALS OF MARYLAND

_____

Petitioner, U. S. Labor Party, respectfully moves this Court to issue a writ of certiorari to review the order of the Court of Appeals of Maryland entered in this case on January 31, 1979.

OPINIONS BELOW

The opinions of the courts below are attached at Appendix.

JURISDICTION

The Order of the Court of Appeals of Maryland was issued on January 31, 1979. This court's jurisdiction is invoked under 28 U.S.C. 2101 (C).

QUESTIONS PRESENTED

1. Whether Respondent was entitled to relief where the statements at issue were no more than "rhetorical hyperbole".

2. Whether Respondent, conceded to be a public figure, was entitled to monetary damages when he failed to introduce clear and convincing evidence of constitutional malice.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment. XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was defendant in a proceeding before the Court of Common Pleas of Baltimore City, which was appealed to the Court of Special Appeals of Maryland in U.S. Labor Party v. Grenville Whitman, No. 1372, and there decided adversely to Petitioner where judgment of the Court of Common Pleas was affirmed and per curiam filed on November 13, 1978, and mandate issued December 13, 1978. Petitioner then sought review by petition for writ of certiorari to the Court of Special Appeals which was denied by order of the Court of Appeals of Maryland on January 31, 1979.

Facts material to the consideration of questions presented are as follows:

Petitioner is an unincorporated association of individuals recognized as a political party with branches in numerous states and headquarters in New York City. It presents candidates for political office and attempted to do this in the September 1975 primary in Baltimore City, Maryland.

Respondent in June 1975 had filed for the City Council Election in Baltimore, Maryland. The Primary Election was to be held on September 9, 1975, and Respondent was a candidate in the Democratic primary to be one of that political party's three candidates, from the 2nd Councilmanic District, in the later to be held general election.

Respondent is a veteran of service with the 82nd Airborne Division of the U. S. Army and he is a 1964 graduate of Harvard University. After his graduation, he worked as a staff member of the Student Non-Violent Coordinating Committee (SNCC) in its civil rights activities in the mid-1960s. He eventually came to Baltimore, Maryland, in 1966 and worked at a local daily newspaper.

Respondent later left the Baltimore, Maryland, Sunpapers and became a full-time worker in the Anti-Viet Nam War movement and became a spokesman and leader of that movement. He also served as a founder of a short-lived underground newspaper. From these activities, he moved to the Man Alive Drug Treatment Center. The Respondent initially served as a member of the Board of Directors of the Drug Treatment Center, but later assumed the position of its Executive Director. The Man Alive Drug Treatment Program was designed to treat the addiction of heroin addicts by the substitution of methadone, a synthetic drug, for the heroin. Methadone given in this way would have the effect of blocking the euphoric feeling the addict received from heroin and thus remove his craving for the drug. The addict was required to report to the center daily for his methadone dosage which was given orally.

During the Respondent's period of service as Executive Director, the problem of drug addiction received increasing amounts of public attention because of the link of the rising

crime rate and its apparent link in some aspects to heroin addictions. Drug Treatment Centers using methadone were viewed by many as the answer, and the Respondent received a great deal of publicity of his views in support of this proposition. The Respondent assisted in the founding of a coordinating organization for drug treatment centers in the City of Baltimore, to assist in the dissemination of administrative aids to these centers. The Respondent held his position with Man Alive from 1969 to 1974. After the Respondent resigned in September, 1974 from the Man Alive Program, he was unemployed for one year, during which time he ran for public office. After the 1975 primary, Respondent worked a number of various jobs including as an administrator with the Sinai Hospital Drug Program and as a furniture salesman.

Respondent was a strong advocate of the use of methadone maintenance in the treatment of those addicted to the use of the narcotic drug heroin. Petitioner and its members are strongly opposed to the use of the narcotic drug methadone as a means of the treatment of heroin addiction. Expert testimony was produced by both parties at the trial, each tending to endorse one side of the controversy, but both experts acknowledging the deep-seatedness of that controversy. A portion of the debate over the use of methadone concerns its background as a drug developed during the Nazi period of recent German history at the time of the Second World War, but the greater controversy surrounded its present uses as a treatment means and the dependence to the drug generated in the user. The Petitioner's objection to this method of treatment is that mere drug substitution is being used and true treatment for the underlying causes of the problem is being offered.

Shortly after Respondent filed as a candidate for the 2nd Councilmanic seat in the Baltimore City Council primary, Petitioner caused to be published and distributed a leaflet attacking Respondent for his prior connection with methadone. The leaflet bears two photographs in the top opposite corners. One photograph in the upper left corner shows bottles of methadone with a swastika superimposed over them. In the upper right corner of the leaflet there appears a photograph of the Respondent. Below the photograph is the text of the leaflet followed by a request for the reader to vote for Petitioner's candidates in the same September 9, 1975, primary election. The leaflet was distributed throughout the 2nd Councilmanic District as well as in other parts of the City of Baltimore.

Respondent presented testimony that after the distribution of the leaflet, a portion of his volunteer political staff devoted time to thinking of ways to rebut Petitioner's leaflet. No testimony was educed that the leaflet resulted in the Respondent losing the primary election or that it was a significant factor in the final vote tally or pattern.

The second leaflet was published approximately three weeks after the Respondent had lost the primary. Respondent conceded that he was still a public figure at the time of its publication.

Petitioner presented testimony concerning the steps its members took to support the charges made about the Respondent in its two leaflets. Jeffrey Steinberg testified that Respondent's activities in or connected with Students for a Democratic Society (S.D.S.), advocacy of the drug methadone on a nationwide basis and his support of "anti-government activities" gave them suspicion that the Respondent was supportive of the ideas of certain individuals they classified as international terrorists.

Steinberg also testified regarding the discovery by the Illinois Crime Commission of Respondent's name and telephone number in the diary of Bernadine Dohrn, a known terrorist whose name appeared on the F.B.I.'s 10-most-wanted list.

Petitioner never maintained at the trial that Respondent was literally guilty of the crimes of murder, rape, robbery, gun running or dope pushing. Petitioner did maintain metaphorically and rhetorically that Respondent's activities equated to the furtherance of such criminal and anti-social activity by his assisting in the creation of the atmosphere that allowed it to flourish. The Petitioner also presented evidence at the trial to indicate that its use of the above terms was not intended to convey a criminal connotation in and of itself.

Timely appeal was noted to the Court of Special Appeals (September Term, 1977, No. 1372), and after briefing and argument the Court rendered a per curiam opinion on November 13, 1978, (a copy of which is attached at Appendix C, A. 4) affirming the judgment against the U.S. Labor Party. The Court determined that the alleged libelous statements in the leaflets were not rhetorical hyperbole but libel could be maintained; the statements were published with reckless disregard of whether they were true or false; and the jury instructions contained a fair statement of the law. This petition seeks review of the judgment rendered against the U. S. Labor Party as affirmed by the mandate of the Court of Special Appeals of Maryland issued December 13, 1978, and the Order of the Court of Appeals of Maryland on January 31, 1979.

REASONS FOR GRANTING THE WRIT

I.

THE INSTANT CASE PRESENTS AN OPPORTUNITY FOR THIS COURT, IN ITS SUPERVISORY AUTHORITY, TO RECOGNIZE THE COMPELLING NEED FOR CONSISTENCY IN DEFAMATION ACTIONS BY CLARIFYING THE SCOPE OF ITS HOLDING IN *GREENBELT V. BRESLER*, IN WHICH STATEMENTS AMOUNTING TO RHETORICAL HYPERBOLE WERE DEEMED INACTIONABLE.

The Court of Appeals of Maryland, when confronted with language amounting to rhetorical hyperbole in the past, erroneously awarded damages. This Court took certiorari to clarify the proper approach to this relatively new concept and ultimately reversed the Maryland decision by finding such words inactionable. *Greenbelt v. Bresler*, 398 U.S. 6 (1970). The next time this issue arose in *Werber v. Klopfer*, 216 Md. 486 (1970), the Court of Appeals of Maryland followed *Bresler* and held that there was no cause of action. However, once again, the Maryland Courts need guidance as the Court of Special Appeals of Maryland, citing this Court's analysis in *Bresler*, has misapplied those teachings in the instant case.

An examination of the record as a whole reveals that this case is controlled by the pronouncement of this Court in *Greenbelt v. Bresler, supra*, In *Bresler*, a real estate developer was engaged with the City Council in intense and controversial negotiations, which involved zoning variances and land for the development of a high school. Members of one community at large were in attendance at a meeting of the City Council where

the developer's negotiating position was characterized by one of the council members as blackmail. When a newspaper printed the statement and also used the word blackmail as a subheading in an article, the developer filed suit for libel and was awarded damages. The Court of Appeals of Maryland affirmed finding such use of the word blackmail actionable. The Supreme Court took certiorari and after making an independent examination of the record reversed and found that the readers would not understand the charge of blackmail to be a statement of literal fact charging the developer with the commission of a criminal offense. Therefore, the Court held that it was constitutionally impermissible to enter judgment in favor of the developer:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, *even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime. Greenbelt Cooperative Publishing Association v. Bresler, supra* at 14, (emphasis added and footnote omitted).

Adopting the approach and analysis of *Greenbelt v. Bresler, supra*, the Court of Appeals of Maryland similarly looked beyond the realm of literal meaning in its analysis and recognized the concept of "rhetorical hyperbole" in *Werber v. Klopfer*, by reversing the lower court. In *Werber* a report made by a Vice-President of Duke University to a local chapter of the University's alumni association was lampooned by Werber, an alumni of the University. The lampoon was distributed to other alumni of Duke University and persons with an interest in and familiarity with the University. Plaintiff Klopfer brought an action based on the following:

> Unfortunately, we have permitted to enter the University too large a number of students who are constantly a source of embarrassment to us with our alumni. They have had on campus to harangue the student body over the last several years a procession of sex deviates, *communists, advocates of narcotics and militant blacks*: Harriett Pimple, Klopfer, Aptheker, Timothy Leary, Ginsberg, Adam Clayton Powell, Stokely Carmichael, Howard Fuller, Martin Luther King, and you name it. They did have one dedicated American in to speak, General Lewis Hershey, but they ridiculed him roundly. *Werber v. Klopfer, supra* at 487-488.

Against the background of the limited distribution of the lampoon and the nature of its distributees who were familiar with the campus and its activities, the Court found:

> Our independent examination of the record in the case at bar leads us to a like conclusion. *We find it impossible to believe that any of the readers of Werber's lampoon would not have understood that*

> *the inclusion of Klopfer in the list of left wing individuals was merely to identify him as a fellow with leftist leanings, a circumstance which he freely admits.* Indeed, to paraphrase the language of Mr. Justice Stewart – *the record is completely devoid of evidence that any of the readers of the lampoon thought Klopfer had been accused* of being a sex deviate, a communist, an advocate of narcotics or a militant black. *Werber v. Klopfer, supra* at 498-497 (emphasis added).

Therefore, it appears that this Court in *Bresler* and the Court of Appeals of Maryland in *Werber* were employing a two-step approach in making their findings:

1. The Courts determined whether it was possible that the statements alleged as defamatory would not be read as statements of literal fact.

2. The Court examined the evidence to ascertain whether there existed any evidence that someone *in fact* understood the statement as literally true.

Likewise, utilization of this two-step approach to the instant case makes clear the inescapable conclusion that the statements at issue amount to no more than rhetorical hyperbole and commands a determination that such statements are not actionable in defamation. An examination of the statements in the leaflet in context with the surrounding information within reveals that these statements are no more than vigorous epithets used to convey Petitioner's intense disapproval of the drug methadone and the proponents of its use. The leaflet describes how the drug methadone was developed.

It states that methadone was developed by the Nazis under the Adolph Hitler regime. The drug was even originally named after Hitler, Dolphine. Its purpose was to aid in slave labor and to make it easy for workers and those in concentration camps to work themselves to death under its mind-dulling influence. Respondent conceded such a connection at trial when he set forth his long advocacy and contact with methadone maintenance programs throughout the country. Petitioner levelled the charge of "murderer" at Respondent because of its view that Respondent was responsible if anyone has overdosed and died as a result of drug use because he was responsible for directing a methadone maintenance program. The general overtone of dislike for the use of methadone as expressed through the body of the leaflet further supports the fact that "murderer" was meant as no more than a vigorous epithet. The "gestapo style takeover" statement and all others using such language attributable to Hitler's era are connected to the explanation of the derivation of the drug methadone and Hitler's involvement with its development and early use to further the gains of a facist regime.

When Petitioner descriptively lists the names of others in the leaflet, such descriptions are direct modifiers of the names used, not Respondent's. He was not being called an ex-military intelligence police chief, Peking agent, rapist, or lesbian. This paragraph is similar to one involved in *Werber* where generally descriptive words were used followed by a list of names of which plaintiff was one. There the court viewed the statement in context and found that these words were not actionable by Plaintiff. However, here the court only examined the literal meanings.

Without dispute some of the language contained therein is not that ordinarily found in everyday or even political publications. But the mere fact of some harshness in tone, syntax or phrasing does not equate to actionable defamation. It must always be remembered that Respondent was a public figure who voluntarily chose to place himself before the public. His qualifications and fitness for office based on his conduct in the past are as much legitimate issues for the voters to consider as the stand Respondent takes on issues involved in the campaign. Any reading of the statements contained in the leaflet will clearly reveal that the Petitioner was not issuing the charge of murderer, rapist, or gun runner upon Respondent. Petitioner's statement in that regard concerned his connection with those who themselves may be guilty of these crimes.

The Petitioner in its leaflets used the literary license of metaphor and rhetoric freely in the two leaflets. It sought to draw attention by grandiloquent language to assert its position against the Respondent. Such use of language no matter how it may shock the individual conscience of the reader must be afforded the protections of the First and Fourteenth Amendments.

The record in the instant case is replete with references to the fact that no one having read the leaflets believed them in the slightest. No testimony or eivdence of any type was presented to the jury in support of the claim that someone believed the leaflet accusations. Respondent testified that he obtained the leaflet "Politics of Addiction" from a neighbor and that she did not believe it. Respondent's expert, Dr. Herbert Smith, could only testify that the average voter, having read the track, in his opinion would have grave doubts regarding the fitness of the Respondent, but in no way could he factually

support that claim. It was incumbent upon Respondent at trial to supply that information or witness to support a claim that someone in fact believed the leaflet literally.

Employing the test as described above should result in a finding that the statements at issue are not actionable because it was probable that no one read them as literal fact and there was no evidence to show that anyone did read them as literally true. Such an analysis would be conformity with this Court's analysis in *Bresler*, and the Court of Appeals of Maryland's interpretation in *Werber*. Since the decision of the Court of Special Appeals of Maryland represents a deviation from principles established in *Bresler*, this Court should exercise its supervisory authority and grant certiorari. Furthermore, Petitioner requests that this Court recognize the compelling necessity of consistency and simplicity in the law of defamation and grant certiorari to clarify this Court's position on the use of rhetorical hyperbole.

II.

THE INSTANT CASE PRESENTS AN OPPORTUNITY FOR THIS COURT, IN ITS SUPERVISORY CAPACITY, TO CORRECT THE MISAPPLICATION OF THIS COURT'S RULINGS REGARDING THE REQUISITE EVIDENCE FOR ESTABLISHING CONSTITUTIONAL MALICE IN DEFAMATION ACTIONS.

A. S. Abell v. Barnes, supra, states that when Maryland Appellate Courts are presented with the alleged libel of a public figure they have the responsibility to make an independent examination of the record to assure themselves that the principles of the First and Fourteenth Amendments are not violated.

The courts quite obviously wish to concern themselves when dealing with constitutional issues that no intrusion into the protected area of free speech has taken place. It is Petitioner's position that such an independent review of the record in the instant appeal will reveal that the record cannot support the judgments here and remain consistent with the provisions of those two amendments.

Assuming, arguendo, that the statements contained in the leaflets are deemed actionable, *N. Y. Times v. Sullivan*, 376 U.S. 254 (1964) holds that as a matter of constitutional law, in a state trial, a public official may recover monetary damages only after he has established "actual" or "constitutional" malice which was defined as knowing use of false information or the reckless disregard of the truth by the party publishing the libel. To ascertain the presence of constitutional malice, the Appellate Court is governed by the principles enunciated in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

> "[R]eckless conduct is *not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication*. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (Emphasis added).

When confronted with the issue of constitutional malice, the Court of Special Appeals of Maryland greatly obfuscated matters by its circular analysis focusing on the literal meaning of the statements used rather than the contextual meaning.

> ". . . Our examination of the record reveals that the appellant, through its investigation, became aware of the various political and community activities in which the appellee had engaged and which are more fully set out earlier in this opinion. But more importantly, our examination also reveals that neither the researcher in charge of the investigation nor the party member responsible for writing and distributing the leaflets had any knowledge that the appellee used drugs while in the military, had been a member of the *SS*, was a murderer, or had been involved with any person or group of persons whose activities included gunrunning, bombing or rape. Nor did the appellant's investigation reveal any basis "for characterizing the appellee as paranoid, except for his refusal to speak with appellant's representative about his background." (Opinion at 9-10.)

The Court went on to summarily dismiss Petitioner's assertion that conclusionary statements drawn from the results of an investigation should not be considered as statements made with reckless disregard for the truth. The Court stated that "such is not necessarily the case when the investigation does not provide a basis for the conclusions drawn." (Opinion p. 10.) Indeed, an examination of the record reveals that the Court's analysis lacks merit.

Factually, Petitioner through its member, Jeffrey Steinberg, began receiving inquiries from either Robert Primack or Larry Freeman, both members of the Petitioner's organization in the early summer of 1975 (E. 472). That information concerned the probable candidacy of Respondent in the upcoming primary election and that Respondent's fitness to serve the public was suspect to them. Having received that information,

Steinberg immediately launched an investigation of the background of the Respondent. That investigation included direct telephone contact, face-to-face interviews with people in the field of methadone, the interviewing of people in New York concerning the Baltimore situation (those people being former long-time residents of Baltimore who were familiar with certain events of interest to the Respondent), and the collating, cross-checking and verification of information concerning Respondent (E. 473). In addition, Steinberg ". . . spoke with Dr. Stephen Pepper who had been a professor at Johns Hopkins University." He "spoke to Marcia Meyer, who was a long time resident of Baltimore, who. . .had been an employee of Johns Hopkins University for some time." (E. 474) Dr. Marion (sic Marie) Myswander (sic Nyswander) of the Rockefeller Institute, and Richard Lane, formerly of the Man Alive Drug Program, were also consulted. The investigation of Respondent's background also consisted of checks with newspaper files to verify information regarding methadone, Respondent's anti-Viet Nam War activities and any contacts Respondent may have had with known terrorists. Viewed from Petitioner's political prospective of being anti-drugs and terrorist activities, the thrust of their investigation was primarily aimed in this direction. The investigation, as described above, points out the fact that Petitioner's statements and conclusions drawn were not fabricated, the product of their imagination, nor so inherently improbable that only a reckless man would have put them into circulation. Therefore, the Court was clearly erroneous when it stated:

> ". . .The appellee's activities in this case, as revealed by appellant's investigation, did not provide *any basis* for drawing the conclusions set out in the leaflet. The recklessness required for a finding of constitutional malice may be established when the

> defendant's statements are fabricated, the product of his imagination, or so inherently improbable that only a reckless man would have put them in circulation. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). We do not agree with the appellant's assertion that the leaflets were neither a fabrication by the appellant's agents or a product of their imagination. When we consider the *disparity between the state of the appellant's knowledge of the appellee's background and the statements made in the leaflets concerning the appellee*, we believe there was a sound evidentiary basis for the jury to find, as they obviously did pursuant to proper instruction from the trial judge, that the statements were published with reckless disregard for whether they were true or false. [Emphasis added.]

No evidence was admitted at trial to show that Petitioner "*in fact* entertained serious doubts as to the truth of his publication" as required by *St. Amant, supra*, at 731 (emphasis added). Rather, the validity of the extensive investigation in this case falls squarely within the findings of the Court in *A. S. Abell Co. v. Barnes, supra*, at 78.

> "There is no evidence to support a conclusion that he knew the statement that appellee had not filed the report was false. And if it be assumed that his investigation was not thorough, that he was negligent in the conduct of it, and that a reasonably prudent man would have taken other steps before making the statement, none of this would be sufficient to show that appellant published the statements with the high degree of awareness of their probable falsity demanded by the test. Reckless conduct is

> not measured by whether a reasonably prudent man would have published or would have investigated before publishing. . . . The evidence here showed that appellant did not simply fabricate the story, or that it was the product of appellant's imagination, or that it was based wholly on unverified information anonymously received or that the statements were so inherently improbable that only a reckless man would have put them in circulation. Nor was the evidence sufficient to establish that there were obvious reasons to doubt the veracity of the reporter or the accuracy of his reports. . . . *We have noted that the inadequacy of the investigation was not sufficient to show actual malice*. And we cannot say that the content of the publication and the manner in which it was presented were sufficient to support a finding under the required test that appellant knew the statements were false or made them with reckless disregard of whether they were false or not." (Citations omitted.) (Emphasis added).

Perhaps the Court of Special Appeals was actually saying that Petitioner evidenced actual malice because it drew the wrong or false conclusion. Even if such conclusions were false, *Abell, supra*, at 70, holds

> "As to the degree of proof to show malice, it must be of 'the convincing clarity which the constitutional standard demands', unassisted by presumptions based on falsity." (Citations omitted.)

As there was no clear and convincing evidence that Petitioner, during its investigation, in fact entertained serious doubts about the truth of the matters published, the Court of

Special Appeals erred in awarding money damages to Respondent. Therefore, Petitioner prays that this Court grant certiorari in order to make clear the application of the actual malice standard and correct the Maryland Court interpretation.

CONCLUSION

For the above-stated reasons, the Petitioner prays this Court issue a Writ of Certiorari to review the judgment of the Court of Special Appeals of Maryland.

Respectfully submitted,

DAVID B. MITCHELL
MITCHELL AND LEE

Counsel for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND
Petition Docket No. 408
September Term, 1978
(No. 1372, September Term, 1977, Court of Special Appeals)

U. S. LABOR PARTY

v.

GRENVILLE B. WHITMAN

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: January 31, 1979.

APPENDIX B

MANDATE

COURT OF SPECIAL APPEALS OF MARYLAND
No. 1372, September Term, 1977

U. S. Labor Party

v.

Grenville B. Whitman

November 13, 1978: Per Curiam filed.
Judgment affirmed.
Costs to be paid by appellant.

December 13, 1978: Mandate issued.

STATEMENT OF COSTS:

In Court of Common Pleas

Record 25.00
Stenographer's Costs 1,472.00

In Court of Special Appeals:

Filing Record on Appeal 30.00
Printing Brief for Appellant 90.03

APPENDIX B.2

Reply Brief 60.73
Record Extract – Appellant – Joint 3,380.00
Printing Brief for Cross-Appellee .....

Printing Brief for Appellee 37.75
Portion of Record Extract – Appellee .....
Printing Brief for Cross-Appellant .....

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this thirteenth day of December, A.D. 1978.

/s/ Howard E. Friedman
Clerk of the Court of Special Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

APPENDIX C

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1372

September Term, 1977

U. S. LABOR PARTY

v.

GRENVILLE B. WHITMAN

Moylan,
Melvin,
Couch,
JJ.

PER CURIAM

Filed: November 13, 1978

APPENDIX C.1

On August 15, 1975, Grenville B. Whitman, appellee, instituted an action for libel in the Court of Common Pleas of Baltimore City against the United States Labor Party, appellant. In his declaration the appellee alleged that in July 1975, at which time he was a candidate for a seat on the City Council of Baltimore, a leaflet containing libelous statements was distributed by the appellant to the general public in the district from which he sought election. Almost one year later, on July 30, 1976, the appellee, by amending his Declaration, further alleged that in October 1975, the appellant distributed a second leaflet containing an additional and different libelous statement. In September 1977, the appellee presented his case at a trial conducted before a jury, with Judge J. Harold Grady presiding. The appellant moved for a directed verdict after the appellee's presentation of evidence, but the motion was denied. Subsequent to the close of all the evidence, the court denied motions for a directed verdict submitted by both parties. The jury then rendered verdicts favorable to the appellee as to both leaflets and awarded compensatory damages of $20,000 for the statements in the July leaflet and $10,000 for the statement in the October leaflet. Motions for a New Trial and/or Judgment N.O.V. and for Remittatur made by the appellant were denied on October 4, 1977, and an appeal was noted on November 2, 1977.

The appellant's contentions on appeal, as we understand them, are: 1) the statements in the leaflets were "rhetorical hyperbole", and therefore not actionable; 2) the appellee failed to introduce clear and convincing evidence of constitutional malice; and 3) the trial court erred in its supplemental instructions to the jury. There is no dispute as to the literal falsity of the statements, the fact of their publication, or the

APPENDIX C.2

amount of damages awarded. Nor is there any dispute as to the appellee's status as a public figure with regard to those matters to which the leaflets were addressed.

FACTS

In June 1975, the appellee filed as a candidate for the Democratic Party nomination for a seat on the City Council of Baltimore for the Second Councilmanic District. Shortly thereafter, the appellant began an investigation into the appellee's background. Information was gathered primarily from newspaper files, government documents, and interviews with people who had knowledge of the appellee. The investigation revealed that, in the decade following his honorable discharge from the United States Army and preceding his entry into the campaign for the City Council, the appellee had been an official of the Student Non-Violent Coordinating Committee, founder of an underground paper, speech writer for Julian Bond, chairman of the Berrigan Brothers defense committee, a participant in the Anti-Vietnam War movement, and a leader of community groups in Baltimore City. In addition, the appellee's name was listed, along with more than 200 other names, in the phone book of a suspected terrorist. From 1968 through 1974 the appellee was employed in the Man Alive Drug Treatment Program, serving as Executive Director of the program for a portion of those six years. The purpose of the program was to treat heroin addicts through the use of methadone. At trial, testimony introduced by the parties revealed both advantages and disadvantages to the use of methadone in the treatment of heroin addicts. We need not settle here any controversy surrounding the use of methadone. All we need

APPENDIX C.3

note is that the appellant takes a position in vehement opposition to the use of methadone and to those, like the appellee, who espouse its use. Consequently, in July 1975, in an apparent attempt to defeat the appellee's candidacy, the appellant distributed throughout the Second Councilmanic District and elsewhere a leaflet entitled "The Politics of Addiction". Below the title there was a photograph of the appellee juxtaposed to a photograph of bottles of methadone. A swastika was superimposed over the photograph of the bottles. The remainder of the leaflet, in relevant part, contained the following statement, the capitalized parts of which are the allegedly libelous remarks:

"Part I: Methadone Maintenance Program

> "GRENVILLE WHITMAN, from his present slick three-piece-suit to his 'community' rhetoric, STINKS OF HIS SS BACKGROUND. This PARANOID FRANKENSTEIN was created by Rand Computer technology and military intelligence – probably THROUGH HIS OWN USE OF DRUGS WHILE AN AIR FORCE PARATROOPER. WHITMAN, WHO IN THE LATE 1960's WAS ALREADY SPREADING HIS MAOIST 'OFF THE PIGS' VERBIAGE, IS NOT ONLY AN AGENT, BUT A MURDERER. If your child or neighbor has OD'd or been subjected to drug induced brainwashing, Whitman is responsible. In 1968, Whitman publically[sic] organized his drug pushing with great fanfare. He directed the notorious 'Man Alive' program better known as 'methadone maintenance'.

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"Methadone is synthetic heroine – only more addictive. It was developed by the Nazi branch of Rockefeller's international cartel and was originally named 'Dolphine' after Adolph Hitler. It was advocated by Brigadeer General, Dr. John Rawlings Rees, (leader of the Rockefeller and Ford Foundation-sponsored fascist think-tank, the Tavistock Institute of London.) to impose a Clockwork Orange style 1984 police state with the aid of local and community health centers like 'Man Alive' and the 'People's Free Medical Center'. Under control through methadone mind dulling addiction a man – like a dragged [sic] race horse – is more easily driven to work himself to death. The real purpose of methadone was – and still is – slave labor.

"Gren Whitman is not merely running for city council in the second district. Since his days with the Berrigans WHITMAN HAS PLAYED A DIRECT ROLE IN BALTIMORE'S HIDDEN GOVERNMENT. OTHER KEY FIGURES IN THIS ATTEMPT AT GESTAPO STYLE TAKEOVER HAVE BEEN 'EX' MILITARY INTELLIGENCE POLICE CHIEF POMERLEAU, PEKING AGENT RICHARD PFEFFER AND THEIR PUBLIC PIGS WALTER 'THE RAPIST' ORLINSKY, AND BARBARA 'WHAT, ME A LESBIAN?" MIKULSKI.

"AN INVESTIGATION INTO WHITMAN'S BACKGROUND, WHICH HE AS A PUBLIC CANDIDATE IS UNWILLING TO REVEAL ('THIS IS ALL THE PUBLIC HAS TO KNOW') WILL EXPOSE THE HIDEOUS UNDERBELLY OF BALTIMORE'S SEWER FACTION, INVOLVING DRUGS, GUN-RUNNING, BOMBING, RAPE, ETC. CALL THE LABOR PARTY WITH THIS INFORMATION AND PRESS CHARGES."

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In the primary election, held on September 9, 1975, the appellee failed to garner a sufficient number of votes for the Democratic nomination. After the primary, but before the general election, the appellant distributed a second leaflet in Baltimore City. The apparent purpose of the second leaflet was to dissuade its readers from voting for the incumbent City Council president and to generate support for a petition to "shut down" the Man Alive Drug Treatment Program. The second of the leaflet's three separate paragraphs contained the following allegedly libelous reference to the appellee's mental health:

> "Orlinsky, like Whitman, or Barbara 'the lesbian' Mikulski, is a public guinea pig, a programmed creation of Baltimore's hidden government run out of Johns Hopkins University. Because these creatures have NO human identity they are totally PARANOID. Their sexual activities are merely a projection of that paranoia."

We now consider the issues raised by the appellant in its brief.

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I.

The appellant contends that the judgment in favor of the appellee, who is conceded to be a public figure, presents the possibility of an infringement of its right to free speech guaranteed by the First Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment, and therefore requires this Court to make an independent examination of the whole record to assure ourselves that the judgment does not constitute a "forbidden intrusion on the field of free expression". *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964); *Time Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6, 11 (1970); *A. S. Abell Co. v. Barnes*, 258 Md. 56, 71, 265 A.2d 207 (1970); *Kapiloff v. Dunn*, 27 Md. App. 514, 523, 343 A.2d 251 (1975). Upon examining the whole record we should find, according to the appellant, that the statements in the leaflets were merely "rhetorical hyperbole", thereby precluding as constitutionally impermissible a libel judgment in favor of the appellee. *Greenbelt Cooperative Publishing Association v. Bresler, supra* at 14.[1]

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[1] In its motion for directed verdict made after the presentation of the plaintiff's case, and later renewed upon the close of all the evidence, the appellant claimed that the appellee failed to show any factual basis on which to permit recovery. The appellant did not, though, specifically raise the contention that the leaflets were rhetorical hyperbole and therefore insulated from a libel award by the First Amendment. Although the grounds for a directed verdict should be stated more specifically in order to preserve for review the issues raised there, we

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In the *Greenbelt* case a real estate developer was engaged with the local city council in intense and controversial negotiations, in which the developer sought zoning variances from the council and the council sought to acquire land from the developer for construction of a high school. During a meeting of the city council at which members of the community were in attendance, the developer's negotiating position was characterized by one of the members as blackmail. In an otherwise accurate and truthful article on the meeting a local newspaper printed the statement made by the community member and also used the word blackmail as a subheading in the article. The developer filed a suit for libel and the jury returned a verdict in his favor. The Court of Appeals of Maryland, in affirming the judgment in 253 Md. 324, 252 A.2d 755 (1969), held that there was sufficient evidence for the jury to find that the article charged the developer with the crime of blackmail. *Id.* at 356. The Supreme Court, after making an independent examination of the record, found:

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[1] (Continued)

have decided, in view of the importance of the First Amendment rights at stake, to consider the issue in this appeal. As Maryland Rule 1085 is not an absolute prohibition against consideration of issues not raised or decided at all below, Charles J. Cirelli & Sons v. Harford County Council, 26 Md. App. 491, 497, 338 A.2d 293 (1974), Meyer v. Agro Transportation Systems, 263 Md. 518, 532, 283 A.2d 608 (1971), it necessarily follows that the Rule does not prohibit review of issues only generally rather than specifically raised below.

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> "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the City of Greenbelt or anywhere else thought Bresler had been charged with a crime." *Greenbelt, supra* at 14.

As the readers could not understand the charge of blackmail to be a statement of fact charging the developer with the commission of a criminal offense, it was constitutionally impermissible to enter judgment in favor of the developer. *See also Letter Carriers v. Austin*, 418 U.S. 264, 285 (1974).

A similar approach was taken by the Court of Appeals in *Werber v. Klopfer*, 260 Md. 486, 272 A.2d 631 (1971). In *Werber* a report made by a vice president of Duke University to a local chapter of the University's alumni association was lampooned by the defendant Werber, an alumnus of the university. In the lampoon, distributed to other alumni of Duke University and persons with an interest in and familiarity with the university, Werber included the name of a member of the faculty, Peter H. Klopfer, in the following context:

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> "Unfortunately, we have permitted to enter the University too large a number of students who are away out in left field and these dissidents are constantly a source of embarrassment to us with our alumni. They have had on campus to harangue the student body over the last several years a procession of sex deviates, communists, advocates of narcotics and militant blacks; Harriet Pimple, Klopfer, Aptheker, Timothy Leary, Ginsberg, Adam Clayton Powell, Stokely Carmichael, Howard Fuller, Martin Luther King, and you name it. . . ."

On appeal from a judgment in favor of the plaintiff, the Court made an independent examination of the record and concluded that, in view of the limited distribution of the lampoon and the nature of the distributees, its readers were reasonably perceptive, generally well informed people who were also knowledgeable about the campus, the faculty personnel, and student activities. Given the background of those who read the lampoon, the Court, following the lead of the Supreme Court in *Greenbelt, supra*, reversed the judgment for Klopfer for the following reasons:

> "Our independent examination of the record in the case at bar leads us to a like conclusion. We find it impossible to believe that any of the readers of Werber's lampoon would not have understood that the inclusion of Klopfer in the list of left wing individuals was merely to identify him as a fellow with leftist leanings, a circumstance which he freely admits. Indeed, to paraphrase the language of Mr. Justice Stewart – the record is completely devoid of

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> evidence that any of the readers of the lampoon thought Klopfer had been accused of being a sex deviate, a communist, an advocate of narcotics or a militant black." 260 Md. at 476.

In both *Greenbelt, supra*, and *Klopfer, supra*, the publications were not actionable because those who read them possessed a knowledge of the matters involved that prevented them from understanding the publications as statements of fact. In *Greenbelt* the article in which the alleged defamatory statement was published provided sufficient background information to prevent a reader from concluding that the developer was being charged with the commission of the crime of blackmail, while in *Klopfer* the familiarity of the readers with the faculty member and the general state of affairs at the University prevented them from concluding that Klopfer was being classified as anything but a leftist.

The circumstances of the present case are different. Here the leaflets were distributed to the general public, who did not have the familiarity with the appellee that would prevent them from understanding the statement made to be a statement of fact. Nor did the content of the leaflets provide the readers with background facts that would prevent them from understanding the meanings of the words to be other than their plain meaning, that is, that the appellee was a drug user while in the military, a member of the SS, a paranoid, and involved in gunrunning, bombing, and rape.

The only alleged libelous statement in either of the leaflets that might have been such that a reader would consider it only a vigorous epithet or rhetorical hyperbole was the statement

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referring to the appellee as a murderer. A person reading this statement, as modified by the sentence which follows it, might not have understood it to be an accusation of criminal homicide, but instead, could have concluded that the accusation derived from the appellee's espousal of the use of methadone, which, in the appellant's view, rendered the appellee responsible for any deaths resulting from misuse of the drug. The mere possibility, though, of understanding a statement to be other than a statement of fact is not sufficient for us to find the statement to be rhetorical hyperbole. The decisions in *Greenbelt, supra*, and *Klopfer, supra*, were based on the impossibility of a reader understanding the publication as a statement of fact. When we read the reference to the appellee as a murderer in conjunction with the other characterizations of the appellee contained in the same leaflet, we cannot conclude that it was impossible for a reader to understand the statement to be an accusation of criminal homicide.

Therefore, we find that the allegedly libelous statements in the leaflet were not rhetorical hyperbole or vigorous epithet, but instead, were representations of fact for which an action in libel could be maintained.

Secondly, the appellant contends that the appellee failed to prove by clear and convincing evidence, as required by *New York Times v. Sullivan, supra*, and its progeny, that the defamatory statements were uttered with constitutional malice, that is, with knowledge that they were false or with reckless disregard of whether they were false or not. Again we are urged by the appellant to make an independent examination of the facts to assure ourselves that there has been no intrusion on its First Amendment rights.

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The crucial consideration, according to the appellant, in determining whether the evidence of malice introduced at trial was clear and convincing is the extensive investigation conducted by the appellant's researching staff. Our examination of the record reveals that the appellant, through its investigation, became aware of various political and community activities in which the appellee had engaged and which are more fully set out earlier in this opinion. But more importantly, our examination also reveals that neither the researcher in charge of the investigation nor the party member responsible for writing and distributing the leaflets had any knowledge that the appellee used drugs while in the military, had been a member of the SS, was a murderer, or had been involved with any person or group of persons whose activities included gunrunning, bombing or rape. Nor did the appellant's investigation reveal any basis for characterizing the appellee as paranoid, except for his refusal to speak with appellant's representative about his background.

Although it may be, as argued by appellant, that conclusionary statements drawn from the results of an investigation should not be considered statements made with reckless disregard for the truth, such is not necessarily the case when the investigation does not provide a basis for the conclusions drawn. The appellee's activities in this case, as revealed by appellant's investigation, did not provide any basis for drawing the conclusions set out in the leaflet. The recklessness required for a finding of constitutional malice may be established when the defendant's statements are fabricated, the product of his imagination, or so inherrently improbable that only a reckless man would have put them in circulation. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). We do not agree with the

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appellant's assertion that the leaflets were neither a fabrication by the appellant's agents or a product of their imagination. When we consider the disparity between the state of the appellant's knowledge of the appellee's background and the statements made in the leaflets concerning the appellee, we believe there was a sound evidentiary basis for the jury to find, as they obviously did pursuant to proper instruction from the trial judge, that the statements were published with reckless disregard for whether they were true or false. In sum, upon our independent "examination of the statements in issue and the circumstances under which they were made . . .", we do not find them to be "of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect". *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946), as quoted with approval in *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1965).

Finally, the appellant argues that the trial judge erred in his supplemental instructions to the jury in answer to a question posed by one of the jurors, claiming that the supplemental instructions negated the following original instructions concerning the meaning of a defamatory statement:

> "You are instructed that under the Law a defamatory statement is one which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby doing harm to that person's reputation, in discouraging other people in the community from having a good opinion about the person named in the statements. So, therefore, you must examine these papers and find out whether the contents are such as they

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would expose a person to public scorn, hatred, contempt or ridicule or cause members of the public who read them to have a poor opinion or a bad opinion of the person named in the statements.

". . . . You are instructed as a matter of law that any statement which charges the Plaintiff with the commission of a crime is defamatory. The evidence is clear that some of the statements made about the Plaintiff in these papers do charge him with the commission of certain crimes, namely murder, rape, bombing, gun running and some other assorted crimes. Other statements that the Plaintiff Whitman complains about do not specifically charge him with the commission of crimes but are claimed to be defamatory for other reasons and counsel will elaborate on that. Some of them refer to paranoia or refer to suspected agents and counsel will go into that with you and the Plaintiff claims that they are also defamatory, in addition to the charges of commissions of crimes. So, as I have said, the statements charging him with the commission of a crime are on their face defamatory. However, you are to read the. . .statements as a whole. I instruct you that the words used in the statement are to be given by you their plain and natural meaning; that is the meaning that they would be understood by the people who read them."

After deliberations had commenced, the jury asked the judge whether the defendants had "no right under the law to print something that they cannot prove". In response the judge briefly summarized his original instructions. A juror then asked

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whether a party would be liable for accusing another of a criminal act if he could not prove the truth of the accusation. The judge answered that the plaintiff, as a prerequisite of recovery in a libel action, must prove that the statement was false.

The appellant's contention on appeal with regard to these supplemental instructions, as was its basis for the exception below, is that the supplemental instructions were contrary to, and hence negated, the original instructions, quoted above, that the jury should read the statements in context to determine if they were defamatory. We, however, hold that the trial judge committed no error in answering the juror's question because his answer complemented, rather than contradicted, the original instructions. *Coca-Cola Bottling Works, Inc. v. Catron*, 186 Md. 156, 164, 46 A.2d 303 (1945). According to the appellant, the judge's answer was, in effect, an instruction that the defendant was liable if the statements were false, even though, when viewed in context, they were not defamatory. By arguing so, the appellant confuses instructions concerning the burden of proof as to truth or falsity and instructions concerning the meaning of a defamatory statement. Although it is apparent from the juror's question that there was some uncertainty on the jury's part as to who must prove the truth or falsity of the statement, there is no indication that the jury did not understand the instructions concerning defamatory meaning. There was, therefore, no need for the judge to again explain the meaning of a defamatory statement. In answering the juror's question, the judge was merely repeating, in part, instructions given after the close of all the evidence. The mere failure to again instruct the jury as to all the factual issues in the trial did

not constitute a contradition of any of the previous instructions. Original and supplemental instructions are sufficient if, when read together, they contain a fair statement of the law. *Casey v. Roman Catholic Archbishop of Baltimore*, 217 Md. 595, 612, 143 A.2d 627 (1958). We conclude here that the instructions did contain a fair statement of the law and that the jury did not understand the instructions concerning the burden of truth to contradict the earlier detailed instruction concerning the meaning of a defamatory statement. This becomes especially evident when one considers that the jury was twice instructed as to the separate requirements of recovery in a libel action; once before the jury retired to deliberate and once immediately before the judge gave the answer to which the appellant objects.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY
APPELLANT.